DATO' MOHD ANUAR EMBONG & ANOR.

v.

BANK BUMIPUTRA (M) BHD.

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
VC GEORGE JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: T-02-126-94]
10 JANUARY 1997

BANKING: *Securities for advances - Loan agreement - Housing development - Insufficient bridging finance - Bank undertook to release titles to enable developer to raise finance - Delay by bank to discharge charges - Housing project abandoned - Whether bank liable - Whether in breach of agreement - Compensation - Damages for expected profits - Whether claimable - Whether too remote - Whether loss of profit the natural and direct consequence of breach - Whether loss forseeable - Contracts Act 1950, s. 74(1), (2)*

EVIDENCE: *Secondary evidence - Admissibility - Statutory requirements - Contents of a feasibility report - Original document not seen or read by witness - Whether admissible - Evidence Act 1950, s. 63(e)*

The appellants intended to develop their land and build thereon 66 units of residential and commercial buildings. To finance the project the appellants obtained an overdraft facility of RM1.5 million from the respondent bank, secured by a legal charge over the said land. The said land was later subdivided into 66 lots. Subsequently, an additional bridging loan of RM1 million was extended by the bank to the appellants, secured by the personal guarantees of the appellants as well as a second legal charge over the said land.

Despite the additional loan, however, the appellants were still short of RM400,000 to meet the construction costs of the project. To overcome the shortfall, the bank agreed to release six titles of the subdivided lots unconditionally in order to enable the appellants to sell them as vacant lots thereby generating the balance of the bridging finance. At the same time five other titles were also surrendered by the bank to the Government by way of compulsory acquisition. These arrangements were evident in the bank's letter to the appellants dated 20 June 1983.

The bank, despite agreeing to the release of the six titles, did not however instruct its solicitors to discharge the charges over the titles until 1987. Even that, it was not until 1992 that actual discharges were made. Meanwhile, as a

result of the bank's delay in effecting the discharges, several attempts by the appellants to sell the the six titles free of incumberences to prospective buyers had to be aborted. The result was that the appellants were unable to raise the RM400,000 they needed, and phase III of the housing project, apparently, could not be proceeded with.

The appellants sought for declarations that they were the owner of the 11 titles and that the bank had unlawfully withheld the execution and delivery of the dicharge of the charges of the titles. They also claimed for damages resulting from the unlawful withholding of the titles. The appellants' claim was allowed, and following that, the Senior Assistant Registrar (SAR) ordered that the respondent pay the appellants RM3,401,820 for projected net profit, and a further RM1,020,546 being 30 % of the projected net profit for the shame suffered by the appellants. On appeal, the learned Judge set aside the SAR's order, and, ruling that the appellants' claim for damages fell outside the ambit of s. 74 of the Contracts Act 1950, awarded nominal damages to the appellants. This apart, the appellants' claim for damages allegedly suffered when they were forced to abort the sale of the properties to the various prospective purchasers was also disallowed by the learned Judge. Hence this appeal by the appellants.

The facts also showed that, to prove the income expected of the housing project, the appellants could not rely on the feasibility report of the project as they had lost the same. In the event, in a purported attempt to prove the same by way of secondary evidence, the appellants produced PW 8, who in turn referred to the document P8 in which the expected income to be derived from the project was mentioned. Before the learned appeal Judges questions, *inter alia,* arose as to:

(i) whether the trial Judge was correct in his interpretation of the provisions of s. 74(1) & (2) of the Contracts Act 1950 in that the appellants' claim for damages did not fall within any of the two limbs of s. 74(1).

(ii) whether the trial Judge was right in awarding only nominal damages.

Held:
Per Siti Norma Yaakob JCA

[1] There are two limbs to s. 74(1) under which comensation becomes payable to the injured party. The first covers the situation when damage or loss caused to the injured party arose naturally in the usual course of things from the breach. The second situation is met when the parties to the contract were fully aware at the time the contract was entered into that damage or loss is likely to result from the breach of it. In either situation the compensation claimable must not be indirect or remote.

[2] The evidence showed that the market value of the 11 titles had increased in value by RM100,000 during the five-year period from 13 June 1987 (when written instructions to prepare the discharge of charges were directed by the bank to its solicitors) to May 1992 (when the discharge of the charges was in fact effected). This being the case, the learned Judge was right when he held that the ingredients of the first limb of s. 74(1) had not been met by the appellants as the appellants suffered no loss arising naturally from the bank's breach.

[3] There was no evidence to support the appellants' contention that it was within the contemplation of the parties that at the time the bank agreed to discharge the titles, loss of profit would result to the appellants should there be a delay in doing so. The loss of profit as claimed is not therefore the natural and direct consequence of the respondent's breach. The compensation claimed under the first limb of s. 74(1) is thus not sustainable.

[4] The breach of the subsidiary contract by the bank caused a delay in the appellants' attempt to transfer the titles free from encumbrances to third party purchasers of such titles. The harm caused to the appellants cannot go beyond this as raising the additional funds was very much the appellants' own efforts. The bank had no control just how the appellants decide to raise the additional funds.

[5] The appellants are entitled to the loss suffered caused by the bank's delay in executing the discharge of charges which resulted in the appellants' inability to transfer clear titles of the encumbered properties to their purchasers. However, the measure of such loss or damage cannot extend to the loss of profit resulting from the appellants' inability to complete phase III of the project. Such loss is not the natural consequence of the bank's breach and on the facts it is not a forseeable loss but an indirect one.

[6] The learned Judge made a correct finding in law when he confined the appellants' loss to nominal damages only and rejected their claim that they were entitled to the projected net profit of RM3,401,820 as awarded by the learned Senior Assistant Registrar.

[7] The consequential loss allegedly suffered by the appellants as a result of being sued by the various third parties are too remote to be claimable. These claims have also not been proved to be due.

[8] The non-production of the feasibility report by the appellants meant that they had failed to prove the amount of the projected net profit. The appellants' attempt to lead secondary evidence to prove the contents of

the feasibility report must fail as the provisions of the unamended s. 63(e) of the Evidence Act 1950 have clearly not been complied with.

[Appeal dismissed. Findings of trial Judge confirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PERBANKAN & KEWANGAN: *Perjanjian pinjaman - Pembangunan perumahan - Pembiayaan sambungan yang tidak mencukupi - Bank berusaha untuk melepaskan hakmilik bagi membolehkan pemaju mendapatkan kewangan - Kelewatan oleh bank untuk melepaskan gadaian - Projek perumahan terbengkalai - Samada bank bertanggungan - Samada melanggari perjanjian - Pampasan - Gantirugi bagi keuntungan yang dijangkakan - Samada boleh dituntut - Samada terlalu jauh - Samada kehilangan keuntungan merupakan akibat terus dan semulajadi hasil daripada kemungkiran - Samada kerugian dapat diramalkan - Akta Kontrak 1950, s. 74(1),(2)*

KETERANGAN: *Keterangan sekunder - Kebolehterimaan - Kehendak-kehendak berkanun - Kandungan laporan feasibiliti - Dokumen asal tidak dilihat atau dibaca oleh saksi - Samada boleh diterima - Akta Keterangan 1950, s. 63(e)*

Perayu berniat untuk membangunkan tanah mereka dan membina di atasnya 66 unit rumah kediaman dan bangunan-bangunan komersyial. Bagi membiayai projek itu, perayu telah mendapatkan kemudahan overderaf sebanyak RM1.5 juta daripada bank responden, yang dijamin oleh satu gadaian ke atas tanah tersebut. Tanah tersebut telah kemudiannya dipecah bahagi kepada 66 lot. Kemudiannya, satu pinjaman penyambungan tambahan sebanyak RM1 juta telah diberikan oleh bank kepada perayu yang dijamin oleh gerenti-gerenti persendirian perayu dan juga gadaian kedua ke atas tanah tersebut.

Walaupun terdapat pinjaman tambahan itu, perayu masih kekurangan sebanyak RM400,000 bagi memenuhi kos pembinaan projek itu. Bagi mengatasi kekurangan itu, bank telah bersetuju untuk melepaskan tanpa syarat enam hakmilik bagi lot-lot yang telah dipecah-bahagi bagi membolehkan perayu menjualnya sebagai lot-lot kosong yang dengan itu dapat menghasilkan baki pembiayaan penyambungan. Pada masa yang sama lima hakmilik yang lain telah diserahkan oleh bank kepada kerajaan melalui pengambilan wajib. Persetujuan ini jelas diterangkan dalam surat bank kepada perayu bertarikh 20 Jun 1983.

Bank, walaupun bersetuju untuk melepaskan keenam-enam hakmilik di atas, tidak mengarahkan peguamcaranya untuk melepaskan gadaian-gadaian ke atas hakmilik tersebut sehingga 1987. Itu pun, pelepasan sebenar hanya dilakukan pada tahun 1992. Sementara itu, disebabkan oleh kelewatan bank dalam menguatkuasakan pelepasan itu, beberapa percubaan oleh perayu untuk menjual

keenam-enam hakmilik tersebut secara bebas-syarat kepada bakal-bakal pembeli terpaksa dibatalkan. Hasilnya perayu telah tidak berjaya mendapatkan RM400,000 yang mereka perlukan itu dan fasa III projek perumahan itu tidak dapat diteruskan.

Perayu memohon pengisytiharan bahawa mereka adalah tuanpunya kepada kesebelas hakmilik berkenaan dan bahawa bank telah secara tidak sah di sisi undang-undang menahan penyempurnaan dan penghantar-serahan pelepasan gadaian hakmilik itu. Mereka juga menuntut gantirugi akibat daripada penahanan secara salah di sisi undang-undang akan hakmilik-hakmilik itu. Tuntutan perayu dibenarkan, dan Penolong Kanan Pendaftar (SAR) memerintahkan supaya responden membayar perayu RM3,401,820 bagi keuntungan bersih yang dijangkakan dan RM1,020,546 yang merupakan 30% daripada keuntungan bersih yang dijangkakan bagi perasaan malu yang dialami oleh perayu. Ketika rayuan, Hakim yang bijaksana telah mengenepikan perintah SAR, dan, dalam memutuskan bahawa tuntutan perayu untuk gantirugi tidak dilingkungi oleh maksud s. 74 Akta Kontrak 1950, telah memberikan gantirugi nominal kepada perayu. Selain itu, tuntutan perayu bagi gantirugi yang dikatakan dialami ketika mereka terpaksa membatalkan penjualan hartanah-hartanah itu kepada beberapa bakal pembeli telah juga tidak dibenarkan oleh Hakim yang bijaksana. Perayu dengan itu telah membuat rayuan ini.

Fakta-fakta juga menunjukkan bahawa, untuk membuktikan pendapatan yang dijangkakan dari projek perumahan itu, perayu tidak dapat bergantung kepada laporan feasibiliti kerana mereka telah kehilangan laporan itu. Dalam halkeadaan itu, dalam satu percubaan untuk membuktikan laporan tersebut melalui keterangan sekunder, perayu telah mengemukakan PW8, yang sebaliknya merujuk kepada dokumen PW8 dalam mana terdapat butir-butir mengenai pendapatan yang dijangkakan itu. Di hadapan Hakim rayuan yang bijaksana persoalan-persoalan antara lainnya berbangkit berhubung dengan:

(i) samada Hakim perbicaraan betul dalam tafsiran beliau mengenai peruntukan s. 74(1) dan (2) Akta Kontrak 1950 bahawa tuntutan perayu untuk gantirugi tidak terlingkung di dalam mana-mana dari kedua-dua cabang s. 74(1).

(ii) samada Hakim perbicaraan betul dalam memberikan hanya gantirugi nominal.

Diputuskan:
Oleh Siti Norma Yaakob HMR:

[1] Terdapat dua cabang kepada s. 74(1) di bawah yang mana pampasan menjadi kena dibayar kepada pihak tercedera. Cabang yang pertama meliputi situasi apabila gantirugi atau kerugian yang disebabkan kepada pihak

tercedera telah berbangkit secara semulajadi menurut perjalanan biasa perkara-perkara hasil daripada kemungkiran. Situasi kedua akan dipenuhi apabila pihak-pihak kepada kontrak mengetahui sepenuhnya ketika kontrak itu dimasukki bahawa gantirugi atau kerugian berkemungkinan akan terhasil daripada kemungkirannya. Dalam mana-mana satu situasi, pampasan yang boleh dituntut tidak seharusnya secara tidak langsung atau sangat jauh.

[2] Keterangan menunjukkan bahawa nilai pasaran bagi sebelas hakmilik tersebut telah meningkat nilanya sebanyak RM100,000 dalam tempoh lima tahun daripada 13 Jun 1987 (apabila arahan-arahan bertulis untuk menyediakan pelepasan gadaian telah diberikan oleh bank kepada peguamcaranya) hingga Mei 1992 (apabila pelepasan itu dikuatkuasakan). Oleh kerana inilah keadaannya, Hakim perbicaraan adalah betul bilamana beliau memutuskan bahawa syarat-syarat cabang pertama s. 74(1) telah tidak dipenuhi oleh perayu kerana perayu tidak mengalami kerugian yang berbangkit secara semulajadi daripada kemungkiran bank.

[3] Tidak terdapat keterangan bagi menyokong penegasan perayu bahawa ianya adalah di dalam fikiran pihak-pihak tersebut bahawa pada waktu bank bersetuju untuk melepaskan hakmilik-hakmilik tersebut, kehilangan keuntungan akan diakibatkan kepada perayu sekiranya berlaku kelewatan dalam melakukannya. Kehilangan keuntungan sepertimana yang dituntut adalah dengan itu bukannya akibat semula jadi dan secara langsung akan kemungkiran responden. Pampasan yang dituntut di bawah cabang pertama s. 74(1) adalah dengan itu tidak dapat dipertahankan.

[4] Kemungkiran kontrak subsidiari oleh bank telah menyebabkan kelewatan dalam percubaan perayu untuk memindahkan hakmilik-hakmilik tersebut tanpa syarat kepada pembeli-pembeli pihak ketiga. Kesukaran yang disebabkan kepada perayu tidak boleh melampaui had ini kerana mengumpulkan dana adalah sesungguhnya usaha-usaha perayu sendiri. Bank tidak mempunyai kawalan mengenai bagaimana perayu memutuskan untuk mengumpulkan dana-dana tambahan.

[5] Perayu adalah berhak kepada kerugian yang dialami yang disebabkan oleh kelewatan bank dalam menyempurnakan pelepasan gadaian yang mana telah menyebabkan kegagalan perayu untuk memindahkan hakmilik-hakmilik harta tersebut tanpa syarat kepada pembeli-pembelinya. Walaubagaimanapun, ukuran kerugian atau gantirugi yang sedemikian tidak boleh berlanjutan kepada kerugian keuntungan yang diakibatkan daripada ketidak-upayaan perayu untuk menyiapkan Fasal III projek tersebut. Kerugian sedemikian bukannya akibat semulajadi kemungkiran bank dan berdasarkan fakta-fakta ianya bukan kerugian yang boleh diramalkan tetapi adalah kerugian tidak langsung.

[6] Hakim perbicaraan telah membuat keputusan yang betul di sisi undang-undang apabila beliau menetapkan kerugian perayu kepada gantirugi nominal sahaja dan menolak tuntutan mereka bahawa mereka berhak kepada keuntungan terunjur sebanyak RM3,401,820 sepertimana yang diawardkan oleh Penolong Kanan Pendaftar.

[7] Kerugian sampingan yang dialami oleh perayu kerana didakwa oleh beberapa pihak ketiga adalah terlalu jauh untuk boleh dituntut. Tuntutan-tuntutan ini juga telah tidak dibuktikan sebagai kena dibayar.

[8] Kegagalan mengemukakan laporan feasibiliti oleh perayu bermakna bahawa mereka telah gagal untuk membuktikan jumlah keuntungan bersih yang terunjur atau dijangkakan. Percubaan perayu untuk mengemukakan keterangan sekunder bagi membuktikan kandungan laporan feasibiliti itu semestinya gagal kerana peruntukan-peruntukan s. 63(e) Akta Keterangan 1950 yang tidak dipinda jelas tidak dipatuhi.

[Rayuan ditolak. Keputusan Hakim perbicaraan disahkan.]

Cases referred to:
Hadley v. Baxendale [1954] 9 ExCh. 341 ***(refd)***
Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn. Bhd. & Ors. [1993] 2 CLJ 495 ***(dist)***
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528 ***(dist)***

Legislation referred to:
Contracts Act 1950, ss. 74(1), (2)
Evidence Act 1950, s. 63(e)

Other source referred to:
Sarkar's *Law of Evidence,* Vol. 1, p. 957

[Appeal from High Court Malaya, Kuala Trengganu; Originating Summons No: 24-132-89]

For the appellants - Cecil Abraham (R.S. Nathan & B. Thangaraj with him); M/s. Thangaraj & Associates
For the respondent - Ambiga Sreenevasan (Peter Pereira with her); M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob JCA:

Proceedings in this appeal began in Kuala Terengganu by way of Originating Summons No. 24-132-89 and the factual matrix insofar as they are relevant to this appeal are as follows.

In May 1979, the appellants purchased a piece of property known as lot 1233, EMR 892, Mukim of Batu Buruk, Kuala Terengganu for the sum of RM785,000. They had every intention of developing the land which covers an area of about five acres, into a housing estate known as Taman Teratai and to finance the purchase as well as the development, they applied for an overdraft facility of RM1.5 million from Bank Bumiputra Malaysia Bhd., the respondent and which we refer to as the bank. The facility was approved by the bank on 28 June 1979 subject to, *inter alia*, the following terms and conditions:

(1) RM670,000 of the facility was to be utilised by the appellants to settle 85% of the purchase price of the land with the appellants meeting the balance of 15% of the purchase price amounting to RM115,000.

(2) The balance sum of RM830,000 of facility was to form the bridging finance for the construction of 66 units of residential and commercial buildings comprising of 53 units of terrace houses, six units of detached houses and seven units of shophouses;

(3) The facility was secured by a first legal charge over the land;

(4) The facility was to be repaid within two years of the first drawdown of RM200,000.

To enable construction of the 66 units of residential and commercial buildings, the land was subdivided into 66 lots on or about 26 October 1982. Pending this sub-division and approval for conversion, no building was constructed on the land during the first 2½ years after the facility was granted, and by 1983, when the appellants realised there were insufficient funds to construct the buildings (as the bridging finance was utilised to service the interests that had accrued), they applied to the bank by letter dated 2 January 1983, for an extension of the facility for another 24 months and an increase of another RM1 million of the bridging loan. In the same letter too, the appellants revised the number of buildings to be constructed on the land by reducing it to 57 units made up of 16 units of two-storey semi-detached houses and four units of two-storey bungalows for phase I, 28 units of two-storey terrace houses for phase II, and nine units of three-storey shophouses for phase III.

On 28 March 1983, the bank approved the extension and additional facility and *inter alia* cancelled the overdraft facility of RM1.5 million and replaced it with an overdraft facility of RM2.5 million. The additional bridging finance of RM1 million was for the construction of the reduced number of 55 units of residential and commercial buildings and this was to be secured by the personal guarantees of the appellants as well as a second legal charge over the same land.

It is the appellants' contention that at the time when the extension and additional financing was approved, the bank was aware that the additional RM1 million was insufficient to meet the costs of construction which was estimated at RM1.4 million; to overcome the shortfall, the bank agreed to release six titles of the subdivided lots unconditionally to enable the appellants to sell them as vacant lots thereby generating the balance of the bridging finance on their own. At the same time the bank also agreed to surrender five more titles to the Government by way of compulsory acquisition. This may well explain why the number of residential and commercial units approved for construction was reduced from the original 66 units to 55 units.

As the fact of the new arrangements did not appear in the bank's letter of approval dated 28 March 1983, the appellants followed it by a letter dated 26 April 1983 written by a company of which the first appellant was the managing director, seeking the immediate release of the six titles without any redemption payment. The bank responded by confirming that the request for release was approved in a letter dated 20 June 1983. It is this letter which subsequently formed the basis of the appellants' claim against the bank in the originating summons.

Following the new arrangements reached in 1983, the appellants then entered into a sale and purchase agreement with one Osman Abdul Ghani who agreed to purchase the six titles for RM380,000 together with the other terms and conditions contained in a letter dated 29 May 1983. Under the agreement, unencumbered ownership of the six titles was to pass to the purchaser within six months from 29 May 1983 and in the event the sale could not proceed, the deposit of RM95,000 paid by the purchaser would be refunded within seven days of the end of the six-month period together with a penalty of 50% and interest of 15%.

The sale was subsequently aborted as the appellants were not able to pass clear titles of the six properties to the purchaser within the time stipulated in their agreement as the bank did not discharge the charges on the six titles. No reason is given why the bank had delayed in the matter and it protracted until 11 June 1987 when the appellants wrote to the bank seeking the release of all the 11 titles and the bank responded by instructing its solicitors to prepare a discharge of the charges over the 11 titles in a letter dated 13 June 1987.

Following this, the appellants entered into fresh sale and purchase agreements with different purchasers to sell the six titles. These included the sale and purchase agreement dated 16 June 1987, entered into with Zainuddin Mohd. Nor, whereby the latter agreed to purchase one lot for RM75,000. Another sale and purchase agreement dated 20 June 1987 entered into with Haji Awang Sdn. Bhd. evidenced the sale and purchase of another lot for RM90,000. A

third sale and purchase agreement dated 16 June 1987 was executed with one Hendon Tahir whereby the latter agreed to purchase one lot for RM75,000. There is mention of a fourth purchaser by the name of Abu Hanifah Nordin but there is no supporting sale and purchase agreement to evidence such sale. There is also reference to two other purchasers but no details or particulars of the sales made to them are available from the appeal records.

Like the first sale, the subsequent sales were also aborted for the same reason that the appellants were not able to pass clear titles without encumbrance to the purchasers as the bank had failed to execute the discharge of charges of the titles and as a result the appellants were sued by some of the purchasers.

On 10 September 1989, the appellants filed the originating summons that we had alluded to earlier on against the bank for unlawfully withholding the discharge of charges in respect of the 11 titles. The appellants contend that because of the bank's omission to discharge the charges over the 11 titles, they could not on their own raise sufficient bridging finance to complete phase III of the project that would have assured them of the profits over the project. It is this loss of profits that the appellants feel very sore about as the facility extended by the bank was only sufficient to complete phases I and II.

In their originating summons, the appellants seek the following remedies:

(1) A declaration that they, the appellants, are the lawful owners of the 11 titles particulars of which are clearly set out in the summons and that bank had unlawfully withheld the execution and delivery of the discharge of charges of the said titles since 13 June 1987, the date when the bank gave its written instructions to its solicitors to prepare the discharge of charges over the 11 titles;

(2) A proper officer of the bank to execute the discharge of the said titles and deliver them to the appellants within two weeks of the date of the order to be made failing which the Senior Assistant Registrar be empowered to execute the discharge of charges on behalf of the bank;

(3) Damages to be assessed and be paid by the appellants for unlawfully bank to the withholding the unconditional release of the aforesaid titles;

(4) Costs; and

(5) Any other relief as the Court deems fit.

On 10 August 1991, Ahmad Fairuz J (as he then was) allowed with costs the appellants' originating summons in terms prayed for and the learned Judge also ordered that damages suffered by the appellants be assessed and paid for by the bank for unlawfully withholding the discharge of charges over the 11 titles.

The bank appealed against the order but the appeal was subsequently withdrawn thereby allowing the assessment of damages to be proceeded with by the Senior Assistant Registrar. This was done over a period of five days when eight witnesses testified for the appellants. The bank did not call any witness.

On 9 July 1992, the Senior Assistant Registrar ordered that the bank pay the appellants:

(1) RM3,401,820 being the projected net profits that the appellants would have made but was in fact lost as a result of the bank's failure to discharge the charges of the 11 titles since 13 June 1987;

(2) RM1,020,546 representing 30% of the projected net profits for the shame suffered by the appellants at the hands of the bank;

(3) Interest at 8% per annum on the judgment sums with effect from 28 March 1986 to date of realisation; and

(4) Costs.

In the proceedings for assessment, the Senior Assistant Registrar had also rejected the appellants' claims for other damages allegedly suffered by them when they were sued by various third parties that included their architects, their project manager, their contractors and the various purchasers of the six titles for various sums allegedly due from the appellants.

Both the bank and the appellants appealed against the order of the Senior Assistant Registrar and in the case of the bank it is against the amounts assessed for the two heads of damages awarded to the appellants and in the case of the appellants it is against the dismissal of their claims for damages when they were sued by the various third parties.

On 27 August 1994, Mohd. Saari Yusoff J found that although the appellants were entitled to damages following the bank's breach of delaying its undertaking to release the 11 titles free of encumbrances, the measure of such damages based on the loss of profits caused by the delay was either not proved or too remote and to that end allowed the bank's appeal, set aside the order of the Senior Assistant Registrar and substituted a sum of RM5,000 being the nominal damages suffered by the interest at the rate of 8% per annum from 27 August 1994 to date of realisation. The learned Judge also ordered that the costs of the proceedings before him and the Senior Assistant Registrar be borne by each party. Although the learned Judge made no specific order on the appellants' cross appeal, a reading of his judgment reveals that he had confirmed the Senior Assistant Registrar's finding in disallowing the appellants' claim for the other damages suffered at the hands of the various third parties

that had sued them. It would appear that the appellants' cross appeal was dismissed, although no specific order to that effect was made.

We are now asked to consider whether the order of Court dated 27 August 1994 has been correctly made and this must be confined to the adequacy of the damages suffered by the appellants resulting from the bank's delay in failing to discharge the charges over the 11 titles. Such discharge was only effected in May 1992.

At the outset of the hearing before us, Cecil Abraham, Counsel for the appellants, intimated that he was not proceeding with the second head of damages awarded by the Senior Assistant Registrar, this being the so-called damages for shame suffered by the appellants as on the facts of this case such a claim cannot be maintained in law. That left us with the following issues.

(1) Whether the trial Judge was correct in his interpretation of the provisions of s. 74(1) and (2) of the Contracts Act 1950 ('the Act') in that the appellants' claim for damages did not fall within any of the two limbs of s. 74(1);

(2) Whether the trial Judge was right in law in awarding nominal damages only; and

(3) Whether the trial Judge had erred in law when he failed to consider the appellants' notice to produce the feasibility report which formed the basis of the computation for the loss of profits.

Before dealing with these issues, we remind ourselves that there are two independent contracts existing between the parties to this appeal. The first is the contract for the facilities, the terms of which are contained in the bank's letter of approval dated 28 March 1983 and which are not in issue before us. The other contract is the bank's undertaking given in its letter dated 20 June 1983 which the appellants maintain should be read to mean not only an undertaking to release specific charged titles immediately, but to free such titles of any encumbrance as requested for by the appellants for the purpose of enabling the appellants to sell such unencumbered titles to raise the additional bridging finance of RM400,000 independently of the bank. It is in respect of the breach of this second contract of undertaking which we say is subsidiary to the principal contract for the facilities that the appellants' cause of action is founded and in law, the compensation payable for such a breach is governed by the provisions of s. 74(1) and (2) of the Act which restate the rule in *Hadley v. Baxendale* [1954] 9 Exch. 341 and that section reads as follows:

Compensation payable for loss or damage caused by breach of contract:

74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract,

compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

There are two limbs to s. 74(1) under which compensation becomes payable to the injured party. The first covers the situation when the damage or loss caused to the injured party arose naturally in the usual course of things from the breach. The second situation is met when the parties to the contract were fully aware at the time the contract was entered into that damage or loss is likely to result from the breach of it. In either situation the compensation claimable must not be indirect or too remote.

The learned trial Judge held that the ingredients of the first limb of s. 74(1) have not been met by the appellants as the evidence shows that the market value of the eleven titles had increased in value by nearly RM100,000 during the five-year period from 13 June 1987 (when written instructions to prepare the discharge of charges were directed by the bank to its solicitors) to May 1992 (when the discharge of the charges was in fact effected). As such the appellants suffered no loss arising naturally from the bank's breach in delaying to discharge the charges.

Likewise the learned trial Judge found no evidence to substantiate the appellants' contention that it was within the contemplation of the parties that at the time the bank agreed to discharge the titles, loss of profit would result to the appellants should there be a delay in doing so.

It is the appellants submission that their loss of profit could come under the first limb of s. 74(1) on the authority of the Supreme Court case of *Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn. Bhd. & Ors.* [1993] 2 CLJ 495; [1993] 2 MLJ 76. In that case the Supreme Court affirmed the finding of the trial Judge that the appellant bank had committed a breach of the overdraft facilities arrangements Mae Perkayuan, the first respondent, had with the appellant bank by prematurely withdrawing such facilities for non-payment of interests on the sums disbursed by the appellant bank. The reasoning behind that finding was that the appellant bank "was not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent is not obliged under the agreement to pay interest during the bridging period." When considering the measure of damages that the appellant bank had to pay the Supreme Court had to pay at p. 89 of the report:

> We are, therefore, of the view that the loss of profits on the housing project which the first respondent would suffer was the natural and probable result of the breach of agreement by the bank, and when the bank agreed to provide the bridging finance to the first respondent, the bank well knew of the loss that the first respondent would incur should the bank break the contract.

We do not for one moment doubt the soundness of that ruling but the facts of *Mae Perkayuan's* case are distinguishable in that only one agreement was involved between the parties namely the arrangements for the granting of secured overdraft facilities for a fixed period of four years. By recalling the facilities mid-term when the agreement had still about 8½ months to run, the natural and probable result of such a breach is the loss of the profits suffered by Mae Perkayuan.

The facts of the appeal before us are somewhat different and as indicated earlier on, there are two independent contracts existing between the parties, the principal one being the contract for the facilities and the subsidiary one being the undertaking to discharge the charges on the eleven titles. If the principal contract had been breached, we have no hesitation in concluding that the appellants had suffered loss of profits as that would have been the natural and direct consequence of the breach. However the breach that we are concerned with is not the breach of the principal contract but the breach of the subsidiary contract namely the delay in executing and effecting the discharge of the charges. Mr. Cecil Abraham whilst appreciating that the nature of the breach in Mae Perkayuan is different from the one before us, nonetheless urged us to follow the reasoning given in Mae Perkayuan by way of a distinct analogy. We however cannot agree with him on this for the following reasons.

In *Mae Perkayuan's* case, the purpose of the appellant bank extending the facilities was to provide financial assistance is to Mae Perkayuan in its development projects. The manner in which such financial assistance is to be provided particularly in the disbursement of the funds is in the complete control of the appellant bank, subject if any, to the terms that have been agreed to with Mae Perkayuan. Thus when the appellant bank decided to withdraw the facilities prematurely, Mae Perkayuan was left high and dry and the direct and natural consequence of the appellant bank's conduct was Mae Perkayuan's inability to proceed with its project and depriving it of the profits it would have made had the facilities been made available.

In our case however, the breach committed by the bank caused a delay in the appellants' attempts to transfer the titles free of encumbrances to third party purchasers of such titles. The harm caused to the appellants cannot go beyond this as raising the additional funds was very much the appellants' own efforts and the bank was in no way involved in that exercise. The bank had no control just how the appellants decide to use the titles to raise over the

additional funds. This is so as the titles had been in the appellants' posession since 22 June 1983, and the fact that the titles were encumbered is no bar to the appellants to charge the titles further to secure the additional funds.

Our attention was also drawn to the case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528, where it was held that the defendants, an engineering company, with knowledge of the plaintiffs' business, having promised delivery by a particular date of a large and expensive boiler, could not reasonably contend that they could not foresee that loss of business profits would be liable to result to the purchaser from a long delay in delivery.

We consider that the decision of the English case is not of much assistance to our case, as the bank cannot be expected to know just how the appellants intend to go about raising the additional bridging finance. In any event, the facts of *Victoria Laundry* were such that the defendants were not only aware of the nature of the plaintiffs' business but had also been informed by letter that the plaintiffs intend to put the boiler in use in the shortest possible space of time. There is no such equivalent evidence before us other than the first appellant, PW8, testifying orally that he had informed the bank that he needed the titles to be discharged urgently for the purpose of conveying clear titles to prospective purchasers. Correspondence passing from the appellants to the bank never express such urgency and this is borne out by the fact that after the bank had agreed to release the titles as contained in its letter dated 20 June 1983, nothing more was heard of the matter until almost four years later when the appellants wrote the letter dated 11 June 1987, inquiring about the release and complaining that they had been hardpressed by the purchasers and authorities. There is no mention that the delay had jeopardised the business profits that they would have made.

Likewise we find nothing wrong with the trial Judge's finding that between 1987 to 1992, the value of the properties had enhanced as there is evidence to that effect in the valuation report produced by the bank, which was admitted unchallenged.

On the facts of this case, we consider that the loss of profits claimed by the appellants is not the natural and direct consequence of the bank's breach and to that end we confirm the learned trial Judge's finding that the compensation claimed under the first limb of s. 74(1) of the Act is not tenable.

We now turn to the second limb of s. 74(1) of the Act, for which the appellants must show that the bank had the requisite knowledge that the 11 charged titles were to be released free of any encumbrance to enable the appellants to sell six of such titles as housing lots so that the proceeds so

acquired would form the much needed additional funds for phase III of the project. It is the communication of these special circumstances surrounding the release of especially the six titles that form the basis and essence of the second limb of s. 74(1). Is there any evidence that the special circumstances had been communicated to the bank?

Before the Senior Assistant Registrar, the first appellant, PW8, testified as follows. In early 1983 he met one of the bank's officers, Hashim Shamsuddin and requested for an additional bridging finance to continue with phase III of the project. It was following this meeting that he made the formal application of the additional bridging loan of RM1 million as contained in his letter dated 2 January 1983 to which was annexed a detailed feasibility report. Three subsequent meetings followed after this as the bank was not satisfied that the additional bridging loan of RM1 million requested for was sufficient to complete phase III. The bank reckoned that at least another 30% financing amounting to RM400,000 was required to cover the construction costs PW8 had explained to the bank officers that he was not prepared to borrow an additional RM1.4 million as that would place him in the position of settling high interest payments and to minimise his liability he had then suggested that the bank release six titles unconditionally so that he can sell them to raise the additional RM400,000 on his own. He had then concluded his oral testimony on the particular meeting when this suggestion was made as follows:

> It is for that reason that the bank approved RM1 million and not RM1.4 million which was required. Bank approval *vide* letter dated 28 March 1983.

PW8's oral testimony was given nine years after the events had taken place and as such it must be tested against the contemporaneous documents produced in the proceedings for assessment.

The bank's letter of approval dated 28 March 1983 running into six pages makes no mention about releasing any title or using such titles to raise the additional bridging finance. However in his subsequent letter dated 26 April 1983 addressed to the bank, PW8 did mention the fact of the discussion about the release of the six titles particulars of which are stated in his letter for the purpose of either selling them as housing lots or required by the Government for infrastructure purposes. No mention is made that the reason for the sale is to raise the additional funds for the project although mention is made that the charges over the six titles will have to be discharged immediately. The bank's response to this request is contained in its two-sentenced letter dated 20 June 1983 wherein the request for the release of the titles which could not be developed is approved. It was pursuant to this letter that the bank released the titles to PW8 two days later on 22 June 1983 and the titles had been with him throughout.

After 22 June 1983 nothing was heard about the status of the eleven titles until 11 June 1987 when PW8 wrote to the bank and we reproduce the pertinent parts of his letter that read as follows:

> I respectfully refer you to the above titles which should have been released long time ago. However, inspite of my reminders and requests you have failed, or neglected to release them.
>
> Your letter of approval MGM/JU/zs/3928 dated 20 June 1983 refers. As the matter is long overdue and I have been hardpressed by the purchasers and the authorities concern I therefore give notice that the above grant must be released within 8 (eight) days of this letter failing which you shall bear all the consequential loss arising from your neglect or failure to do so.
>
> Further, I am to intimate that the above grants are already in my safe custody.
>
> Thanking you in anticipation for immediate attention and action.

It was following this letter that the bank instructed its solicitors by letter dated 13 June 1987 to prepare the necessary documentations to discharge the charges over the 11 titles.

We pause here to consider the effect of the correspondence passing between the parties. We cannot but detect the possibility that initially the bank may well have been mistaken as to the true intent and purpose surrounding the release of the 11 titles. That belief can be gauged from the following factors. To begin with all negotiations for the additional bridging loan were made between the parties without the aid of any independent legal advice. No complaint is made by the appellants as to any loss suffered by them during the period 1983 to 1987 when the titles still remained encumbered. For that matter there is no evidence of any communication coming from the appellants to show the urgency of having the charges of the 11 titles discharged. It must also be remembered that in 1983 following the bank's approval to release the six titles, the appellants had immediately entered into a sale and purchase agreement, the terms of which are contained in the letter dated 29 May 1983, with one Osman Abdul Ghani who had agreed to purchase all six titles for RM380,000. That sale was aborted subsequently due to the appellants' failure to pass clear titles of the properties to the purchaser which in turn was caused by the bank's failure to discharge the charges. Since delay was the root problem caused by the bank's failure to take immediate action to discharge the charges and that delay had persisted since 20 June 1983 when the bank wrote approving the release, the appellants had kept quiet until June 1987 when they finally complained of such delay and the bank responded by instructing its solicitors to prepare the discharge. From the conduct of the parties it would appear that there may well have been a miscommunication as to the true intent and purpose of the release of the 11 titles sought by the appellants and for

which the bank cannot be said to be able to foresee any loss that was likely to occur. It is this factor that affirm our finding that the element of communication of special circumstances is absent to enable the appellants to base their loss on the second limb of s. 74(1).

Despite the appellants' failure to come within the provisions of s. 74(1) of the Act, the fact still remains that the discharge of the charges was only effected by the bank in May 1992, a delay of more than four years from the time the bank instructed its solicitors to do so in June 1987. It is this delay which the bank has been found accountable to the appellants for any loss or damage suffered by them during that period, but the measure of such loss or damage cannot extend to the loss of profit resulting from the appellants' inability to complete phase III of the project. We say such loss is not the natural consequence of the bank's breach and on the facts of this appeal, it is not a forseeable loss but an indirect one. Nonetheless the appellants are entitled to the loss suffered caused by the bank's delay in executing the discharge of charges which resulted in the appellants inability to transfer clear titles of the encumbered properties to their purchasers but such loss must be limited to nominal damage only. In this respect we consider that the learned trial Judge made a correct finding in law when he confined the appellants' loss to nominal damages only and rejected their claim that they are entitled to the project net profits of RM3,401,820 as awarded by the Senior Assistant Registrar.

Even if we are wrong in this, the appellants still have to prove the amount of the projected net profit that they had lost. The calculations for such projected net profits are found in the appellants' feasibility report that was attached to P8, their letter dated 2 January 1983 applying to the bank for an extension and increase of the first bridging loan. As such, they depended on the report to prove the amount of their loss, but unfortunately they could not produce it as they had lost their copy in a flood. Much was made by the appellants of the bank's failure to produce the report after a notice to produce dated 17 February 1992 was served on the bank and the learned Judge's omission to consider this in his judgment. It is our opinion that the appellants have no cause to complain about this as the burden of proving the amount of loss suffered lies with the appellants throughout. In any event since the learned Judge had already decided that since the loss suffered by the appellants can only be nominal in nature the omission to consider the failure to produce the report had become a non issue. In the absence of the report, the maker was also not called to testify and neither was he identified. Instead, PW8 - in an attempt to lead secondary evidence of the contents of the report - referred to P8, which mentioned the expected income to be derived from the project.

The right to adduce secondary evidence is governed by the provisions of the unamended s. 63(e) of the Evidence Act 1950 as the amendment to that subsection came into effect in 1993, after the proceedings for assessment.

The unamended s. 63(e) reads as follows:

63. Secondary evidence includes:

(a) .....

(b) .....

(c) .....

(d) .....

(e) oral accounts of the contents of a document given by some person who has himself seen it.

The effect of s. 63(e) has been clearly stated by Sarkar's *Law of Evidence,* Vol. 1 at p. 957 to be as follows:

> Under this clause it is necessary that the person giving oral accounts of the contents of a document must have himself seen the original document and not a copy. 'Seen' means 'read' (*Ma Mi v. Kallander, infra*) "A person who proposes to testify to the contents of a document, either by copy or otherwise, must have read it. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence."

It is clear that before secondary evidence of a document can be made admissible, there must be some ground work to establish that the witness giving such evidence had not only seen the original document in question but had also read it. In this case there is no such evidence led to show that PW8 (the only witness who testified to the amount of the loss) had seen and read the feasibility report. Giving evidence on P8, is not giving evidence of the contents of the feasibility report for which we say PW8 was unqualified to testify. For that matter too, we cannot accept the computation of loss of profits tendered by Mr. Cecil Abraham as the alternative to the projected net profits as compiled by the feasibility report as the former did not come by way of evidence.

Finally we come to the consequential losses suffered and claimed by the appellants when they were sued by third parties for various sums allegedly due from the appellants. We start with the purchasers of the six released lots who have been identified to be:

(1) Osman Ghani

(2) Abu Hanifah Nordin

(3) Zainuddin Mohd. Nor

(4) Haji Awang Sdn. Bhd.

(5) Hendon Tahir

The sale of the six lots to Osman Ghani, PW1, was made in 1983 and since the appellants are claiming for losses suffered in 1987, whatever losses the appellants had suffered at the hands of PW1 cannot be maintained. In any event PW1 had testified that he had settled his claim with the appellants.

Abu Hanifah Nordin did not testify before the Senior Assistant Registrar and whatever claim he had against the appellants was admitted by PW8 to have been settled by the bank. As such the appellants suffered no loss.

The claims of both Zainuddin Mohd. Nor and Hj. Awang Sdn. Bhd. against the appellants are still pending in the Klang and Shah Alam Sessions Courts respectively and as such the damages allegedly suffered by the appellants have not yet crystallised.

As for the purchaser, Hendon Tahir, PW8 has admitted that she did not file any action against him.

As for the other claims made by:

(1) Akitek Indahreka, the project's architects for their fees;

(2) Mohd. Anuar & Co., the project manager also for their fees;

(3) Mae Bina Sdn. Bhd., the main contractors for their construction costs; and

(4) Chee Kie Cheong, the subcontractor for his sub-contract works.

we consider such claims to be too remote to be claimable against the bank. For this reason and the fact that the claims of the third parties have not been proven to be due, we confirm the Judge's findings that such claims cannot be maintained.

For the reasons that we have given, we dismiss this appeal with costs. We confirm the findings of the trial Judge and we order that the deposit be paid to the respondent bank to account of its taxed costs.

Reported by WA Sharif